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NTSB Order No. EA-3873

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 28th day of April, 1993

_____)	
JOSEPH M. DEL BALZO,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-11120
v.)	
)	
WILLIAM C. LATHAM,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge Joyce Capps, issued on March 6, 1991, following an evidentiary hearing.¹ By that decision, the law judge affirmed an order of the Administrator suspending respondent's private pilot certificate for 30 days on allegations that he violated sections 91.9 and 91.90(a)(1) of the Federal

¹The initial decision, an excerpt from the hearing transcript, is attached.

Aviation Regulations (FAR), 14 CFR Part 91, as a result of his unauthorized incursion into the Detroit Terminal Control Area [TCA].²

Respondent asserts on appeal that the Administrator failed to meet his burden of establishing the allegations by a preponderance of the evidence. The Administrator has filed a brief in reply, urging the Board to affirm the law judge's initial decision and order.³ Upon consideration of the briefs of the parties, and of the entire record, the Board has determined that safety in air commerce or air transportation and the public interest require affirmation of the initial decision and the Administrator's order. For the reasons that follow, we deny respondent's appeal.

²FAR sections 91.9 and 91.90(a)(1) [now recodified as 91.13(a) and 91.131(a)(1)] provided at the time of the incident as follows:

"§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

§ 91.90 Terminal control areas.

(a) Group I and II terminal control area operating rules. No person may operate an aircraft within a terminal control area designated in Part 71 of this chapter except in compliance with the following rules:

(1) No person may operate an aircraft within a terminal control area unless that person has received an appropriate authorization from ATC prior to operation of that aircraft in that area."

³Respondent's motion to file a response to the Administrator's reply brief and for oral argument is denied. There has been no showing of good cause for the filing of an additional brief, nor do we perceive any need for further elucidation of respondent's position. See 49 CFR § 821.48.

On August 4, 1988, an air traffic controller at Detroit Metro observed an unidentified VFR⁴ aircraft southeast of Salem VOR, at an altitude of approximately 3600 feet. The aircraft entered the TCA without authorization from air traffic control (ATC). The TCA violator came within seven or eight miles of the airport, and ATC was required to instruct a United Airlines flight on approach to accelerate its descent, in order to avoid the targeted aircraft. The United crew verified the altitude of the TCA violator.

After the TCA violator left the Detroit TCA, but while it was still on the radar scope of the Detroit Metro controller,⁵ the Detroit Metro controller called the Cleveland ATC Center and pointed the target out to a Cleveland Center controller. The Cleveland Center controller verified seeing VFR traffic at the altitude specified by the Detroit Metro controller. The Detroit Metro controller testified that he asked the Cleveland Center controller to track the target to determine where the TCA violator landed.

The Cleveland Center controller corroborated the testimony of the Detroit Metro controller. He testified that the Detroit Metro controller pointed out a VFR target travelling in a

⁴The controller knew that the aircraft was operating under visual flight rules ("VFR") because it was squawking 1200, the VFR code, on its transponder, rather than a discrete code which would have been assigned to an aircraft operating under instrument flight rules ("IFR").

⁵The Detroit Metro controller testified that his scope extends 40 miles beyond his jurisdiction.

southeasterly direction, in the vicinity of the Pelee intersection, at an altitude of 3500 feet. According to this controller, he observed no other VFR traffic in the area, and there is no doubt in his mind that he observed the TCA violator which had been targeted by Detroit Metro. The Cleveland Center controller then called the Cleveland Tower approach controller. When the Cleveland Tower approach controller acknowledged that he saw the targeted aircraft on his scope, the Cleveland Center controller told him that the aircraft was a TCA violator and requested that the aircraft's identification be relayed to Detroit ATC.

The Cleveland Tower approach controller testified that he observed the TCA violator coming from the northwest. He tracked the aircraft for 15 or 20 minutes, and he observed the target descending into Cuyahoga County Airport.

The Cleveland Tower approach controller continued to track the target, but since, in his words, there was virtually no traffic, it was decided that the approach position would be transferred to the controller next to him, who was already working the combined departure and satellite positions. The approach controller physically pointed the target out to that controller on the radar scope.

The combined positions controller testified that he configured his scope to the other controller's scope, thereby combining their positions, and that he observed the target that the other controller pointed out to him. The target was on a

southeast heading and appeared to be descending to the Cuyahoga County Airport. This controller testified that he tuned into Cuyahoga County Tower's frequency and heard civil aircraft N54VT attempting to call the tower, and giving his location. He testified that this location correlated with the target he was tracking on his radar scope. He tried to contact N54VT, but he got no response. The controller then asked another aircraft to contact N54VT and have him call ATC. Thirty minutes later, the pilot of N54VT called the Cleveland Tower. He was told that he apparently violated the Detroit TCA, which he denied. The pilot of N54VT refused to give his name.

The FAA inspector who was assigned to investigate this TCA incursion testified that he subsequently identified respondent, who he had identified as the pilot of N54VT, and that he interviewed him. According to the FAA inspector, respondent explained that he had departed from Oshkosh, Wisconsin for Cuyahoga County Airport, and that he had travelled along Victor 42, which would have taken him outside the Detroit TCA. Respondent also told the inspector that he intended to fly to the left of the TCA, but that, "before he realized his actual position, he was already in the TCA." See Administrator's Exhibit 8, "Statement of Interview." At the hearing, respondent denied the admission. He insists that he was not the TCA violator.

Respondent contends on appeal that the Administrator's case must fail, notwithstanding the controllers' testimony that the

aircraft they tracked from the Detroit TCA to Cuyahoga County Airport was his aircraft. We disagree.

We find unpersuasive respondent's argument that the tracking of the aircraft was faulty because of one purported discrepancy.

According to Administrator's Exhibit A-4, a transcript of the Detroit Metro controller's communication to the controller at Cleveland Center, at 0307:59 the TCA violator was squawking the VFR transponder code of 1200, was at an altitude of 3500 feet, and was "about 4-5 miles NW of Pelee." Cleveland Center acknowledged the target five seconds later by stating, "Yeah VFR Right Yeah" (See Administrator's Exhibit A-4), although in the statement which the Cleveland Center controller made several days after the incident, he indicated that he was contacted at 0311, and that at some unspecified time the target he observed was 3 miles northwest of Pelee, at 3500 feet, squawking code 1200. When questioned about his observations at the hearing, the Cleveland Center controller stated there was "no doubt" in his mind what target the Detroit controller was talking about, because there was no other VFR traffic in the area. (TR 63-66).

We agree with the law judge, who found that this discrepancy was inconsequential.

Moreover, we reject respondent's argument that we must draw an adverse inference against the Administrator because he failed to preserve computer tracking data which could have established the precise location of his aircraft. There is absolutely no evidence in this record to suggest that the Administrator either

intentionally withheld or destroyed such evidence. Therefore, there is no basis in law for drawing an adverse inference against the Administrator because he failed to preserve the evidence. Administrator v. Rauhofer, NTSB Order No. EA-3268 (1991).

In the Board's view, the testimony of the controllers who were involved with the tracking of this aircraft is sufficient to support the conclusion that it was respondent's aircraft which was observed in the Detroit Metro TCA. See Administrator v. Blackman, NTSB Order No. EA-3494 at 5 (1992)(Evidence that controllers communicated with each other and tracked the aircraft continually through to the point at which it was identified is sufficient to establish identity of TCA violator). This testimony was found by the law judge to be credible,⁶ and respondent fails to persuade us otherwise. In any event, respondent's admission to the FAA inspector that he was in or near the vicinity of the TCA at the time of the incursion and that he operated his aircraft at the same altitude, in the same direction, and over the same route as the TCA violator, leaves us with little doubt that the aircraft identified by Detroit Metro was in fact the aircraft respondent operated. As we concluded in Blackman regarding our evaluation of similar evidence of a TCA

⁶We reject respondent's claim that the law judge's credibility findings in favor of the Administrator's witnesses are inadequately explained in the initial decision. We are satisfied with the law judge's comments to the effect that the controllers had no reason to testify against respondent, and her finding that respondent was more forthcoming with the inspector than on the stand, which, in the Board's view, indicates that she observed and evaluated his demeanor at the hearing, which it is her prerogative to do.

violator who was tracked⁷ by multiple controllers, "Although mistaken identification can occur, we believe the evidence overcomes any reasonable possibility of it here." Id. at 7.⁸

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The Administrator's order and the initial decision are affirmed; and
3. The 30-day suspension of respondent's private pilot certificate shall commence 30 days from the date of service of this order.⁹

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

⁷Respondent's entire argument concerning the handoff requirements of the FAA's Air Traffic Control Manual, Order 7110.65E is irrelevant. As the Administrator's witnesses made clear in this record, respondent's aircraft was not handed off from one facility to another; it was tracked as an unidentified target. Thus, the requirements of the ATC Manual are inapplicable.

⁸Respondent's claim that other VFR aircraft may have landed at Cuyahoga County Airport at the same time as his aircraft is belied by the testimony of the controllers, who, unlike respondent, were in a position to observe on their radar screens that the only other aircraft in the area were IFR.

⁹For purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR §61.19(f).